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Tee Kah Sing v Siva Kannan a/l Peruman & Anor

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HIGH COURT (JOHOR BAHRU) — SUIT NO JA-22NCvC-165–07 OF 2017
SEE MEE CHUN J
29 JULY 2018

C

Contract — Specific performance — Sale and purchase agreement — Plaintiff claimed for specific performance of sale and purchase agreement ('SPA') — Defendants counterclaimed for declaration that SPA null and void — Whether SPA signed as collateral for plaintiff to grant friendly loan to first defendant — Whether SPA signed — Whether parties bound by terms of SPA — Whether there was friendly loan as alleged by first defendant — Whether first defendant intended to sell property — Whether SPA valid, enforceable and binding on both plaintiff and defendants — Whether pecuniary compensation for non-performance afforded adequate relief — Whether this was an apt case for specific performance — Specific Relief Act 1950 s 11(1)(c)

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The plaintiff's claim in the present case was for a specific performance of a sale and purchase agreement ('the SPA') entered into between him and the defendants for the purchase of the defendants' property. The defendants opposed the claim and argued that the signing of the SPA was required as a collateral or condition for the plaintiff to grant a friendly loan to the first defendant, whereby the said loan was required to pay the suppliers of the first defendant's company. In essence, it was a money lending transaction. The first defendant said that it was his understanding that the SPA had to be signed as he required a short-term loan of RM100,000 for six months where during this period, he had to pay interest of RM5,000. This was told to him by an agent known as CK Lim ('Lim') and also by the plaintiff's solicitor for the SPA transaction ('Nurul') who practiced in a law firm known as Messrs. Woon. The first defendant was of the understanding that the SPA would be cancelled upon repayment of the loan. He submitted that he could not have intended to sell the property when the purchase price was RM303,000 and the market value at RM550,000. The defendants argued that there had been efforts to find out the outstanding loan amount but to no avail. The defendants therefore counterclaimed for a declaration that the SPA was null and void. The issue raised in the present action was whether the SPA was valid, enforceable and binding on both the plaintiff and the defendants.

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Held, allowing the plaintiff's claim and dismissing the defendants' counterclaim with costs:

(1) The evidence showed that the SPA was duly signed by both parties and this was confirmed by the first defendant. The defendants having signed the SPA were therefore bound by the terms stipulated therein. The first defendant was a highly educated person and he had worked as a regional commercial manager. He confirmed that he could understand the SPA and agreed that it was unusual and improbable for a law firm to prepare SPA under the guise of a loan transaction. Based on the above evidence, it was more probable that the first defendant knew that he had signed an agreement for the sale and purchase of land, and being from the commercial world, he would know that one is bound by what is signed. It was not probable that Nurul would have told defendants otherwise (see paras 15, 18 & 20–21).

(2) An analysis of the evidence showed that it was not probable that Lim appeared from nowhere to approach the first defendant with the offer of a loan or that Lim would even know that the first defendant was in need of a loan. It was also not probable that the first defendant would not know Lim's full name when he was going to take up a RM100,000 loan, mortgage his property and to accept the assurances of a total stranger that the SPA would be cancelled upon repayment of the loan. Further, if the loan was to pay the company's suppliers, surely it ought to be done by the company and not the first defendant personally. There was also no proof of the company's indebtedness to its suppliers. Based on the evidence, the court concluded that there was no such Lim and there was no friendly loan given under the terms as stated by the first defendant (see paras 29–31).

(3) If the court were to accept the evidence that Lim existed, then it was Lim who gave the loan and not the plaintiff. By the first defendant's evidence, he had not met the plaintiff, the discussion on the loan was with Lim and the plaintiff was not Lim. As the plaintiff was not a party to the loan, the contention that the SPA was a collateral for the loan could not stand (see para 33).

(4) The first defendant stated that he could not have intended to sell the property when the purchase price was RM303,000 and the market value at RM550,000. The first defendant had agreed there was no valuation report produced in the court and that if the property was worth that much he would not have pledged it as a security for a RM100,000 loan. The first defendant's own evidence thus put paid to his contention of not intending to sell at a lower price when there was no proof of the market value (see para 35).

(5) There was no proof that there had been efforts to find out the loan amount outstanding and that the first defendant had called Nurul several times who told him to contact Lim who in turn asked him to refer to Nurul. There were also no documents to show that Messrs Woon had

given all sorts of excuse to prevent the defendants from repaying the loan or that there was any notice of demand to Messrs Woon to this effect (see para 37).

(6) From the totality of the evidence, this was an SPA for the sale and purchase of the property and not a loan agreement. This was an apt case for specific performance pursuant to s 11(1)(c) coupled with illustration (a) of the Specific Relief Act 1950 where the court found that pecuniary compensation for non-performance would not afford adequate relief. The plaintiff too had substantially performed his obligations under the SPA by payment of the deposit of RM100,000, payment of the redemption sum which was subsequently returned by the bank due to a hold transaction from the first defendant and the payment into Messrs Woon's client account (see para 43).

[Bahasa Malaysia summary

Tuntutan plaintif dalam kes ini adalah untuk pelaksanaan spesifik untuk satu perjanjian jual beli ('PJB tersebut') diantara plaintif dan defendan untuk pembelian hartanah defendan. Defendan menentang tuntutan tersebut dan menghujahkan bahawa PJB tersebut ditandatangani sebagai cagaran atau syarat untuk plaintif membenarkan satu 'friendly loan' kepada defendan pertama, yang mana pinjaman tersebut diperlukan untuk membayar pembekal syarikat defendan pertama. Secara asasnya, ianya merupakan satu transaksi pinjaman wang. Defendan pertama menyatakan bahawa adalah fahaman beliau bahawa SPA tersebut perlu ditandatangani kerana dia memerlukan satu pinjaman jangka-masa pendek berjumlah RM100,000 untuk tempoh enam bulan, yang mana dalam tempoh tersebut, dia perlu membayar faedah sebanyak RM5,000. Perkara ini diberitahu kepada defendan oleh seorang agen yang dikenali sebagai CK Lim ('Lim') dan juga oleh peguam plaintif untuk transaksi PJB tersebut ('Nurul') yang beramal di firma guaman dikenali sebagai Tetuan Woon. Defendan pertama berfahaman bahawa SPA tersebut akan dibatalkan setelah pinjaman tersebut dibayar semula. Adalah dihujahkan bahawa defendan tiada niat untuk menjual hartanah tersebut kerana harga pembeliannya adalah RM303,000 manakala nilai pasaran adalah RM550,000. Defendan menghujahkan bahawa wujud usaha untuk mengenalpasti jumlah pinjaman belum bayar tetapi tidak berjaya. Oleh itu, defendan membuat tuntutan balas untuk satu pengisytiharan bahawa SPA tersebut adalah batal dan tidak sah. Isu yang dibangkitkan dalam tindakan ini adalah sama ada SPA tersebut sah, boleh dikuatkuasakan dan mengikat plaintif dan defendan.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntuan balas defendan dengan kos:

(1) Keterangan menunjukan bahawa PJB tersebut telah ditandatangani seperti yang sepatutnya oleh kedua-dua pihak dan ini di sahkan oleh defendan pertama. Oleh kerana defendan-defendan telah

menandatangani PJB tersebut, terikat dengan terma-terma yang terkandung dalamnya. Defendan pertama merupakan seorang individu yang terpelajar dan pernah bertugas sebagai 'regional commercial manager'. Dia mengesahkan bahawa dia memahami SPA tersebut dan bersetuju bahawa adalah luar biasa dan tidak munasabah untuk satu firma guaman menyediakan SPA dibawah samaran satu transaksi loan. Berdasarkan keterangan di atas, adalah lebih berkebarangkalian bahawa defendan pertama tahu bahawa dia telah menandatangani perjanjian untuk penjualan dan pembelian tanah, dan memandangkan beliau dari dunia komersil, dia akan tahu bahawa seseorang itu terikat dengan apa yang ditandatangani. Adalah tidak munasabah bahawa Nurul akan memberitahu defendan-defendan sebaliknya (lihat perenggan 15, 18 & 20–21).

(2) Analisa keterangan menunjukan bahawa adalah tiada berkebarangkalian bahawa Lim muncul secara tiba-tiba dan mendatangi defendan pertama dengan tawaran untuk satu pinjaman ataupun yang Lim akan mengetahui bahawa defendan peertamal tidak akan mengetahui nama penuh Lim apabila dia akan mendapatkan satu pinjaman berjumlah RM100,000, gadaikan rumahnya dan menerima jaminan seorang yang tidak dikenali bahawa PJB tersebut akan dibatalkan setelah pinjaman dibayar semula. Lanjutan, sekiranya pinjaman tersebut untuk membayar pembekal syarikat, semestinya ianya sepatutnya dilakukan oleh syarikat tersebut dan bukannya defendan pertama secara peribadi. Tiada juga bukti bahawa syarikat berhutang dengan pembekalnya. Berdasarkan keterangan, mahkamah memutuskan bahawa tidak wujud Lim dan tiada 'friendly loan' diberikan di bawah terma seperti dinyatakan oleh defendan pertama (lihat perenggan 29–31).

(3) Sekiranya mahkamah menerima keterangan bahawa Lim wujud, oleh itu, Lim merupakan individu yang memberikan pinjaman dan bukannya plaintif. Melalui keterangan defendan pertama, dia tidak pernah bertemu dengan plaintif, perbincangan perjanjian tersebut dilakukan bersama Lim dan plaintif bukan Lim. Oleh kerana plaintif bukan pihak kepada pinjaman tersebut, pendapat yang PJB tersebut merupakan cagaran untuk pinjaman tersebut tidak boleh diterima (lihat perenggan 33).

(4) Defendan pertama menyatakan bahawa dia tidak berniat untuk menjual hartanah tersebut apabila harga pembelian adalah RM303,000 dan nilai pasaran adalah RM550,00. Defendan pertama bersetuju bahawa tiada laporan penilaian dikemukakan di mahkamah dan sekiranya hartanah tersebut bernilai sebegitu, dia tidak akan menyandarkan ia sebagai jaminan untuk pinjaman berjumlah RM100,000. Adalah keterangan defendan pertama sendiri yang mengagalkan pendapatnya bahawa tiada niat untuk jual pada harga yang lebih murah kerana tiada bukti mengenai nilai pasaran (lihat perenggan 35).

(5) Tiada bukti bahawa wujud usaha untuk mengenal pasti jumlah pinjaman belum bayar dan bahawa defendan pertama telah menghubungi Nurul beberapa kali yang memberitahunya untuk menghubungi Lim yang kemudiannya menyuruhnya merujuk kepada Nurul. Tiada dokumen untuk menunjukan Tetuan Woon telah memberikan pelbagai alasan untuk menghalang defendan-defendan dari membayar semula pinjaman tersebut atau wujud apa-apa notis tuntutan oleh Tetuan Woon untuk memberi kesan yang sama (lihat perenggan 37).

(6) Daripada keseluruhan keterangan, ini merupakan satu PJB untuk penjualan dan pembelian hartanah dan bukan perjanjian pinjaman. Ini merupakan satu kes yang sesuai untuk pelaksanaan spesifik selaras dengan s 11(1)(c) dan ilustrasi (a) Akta Relif Spesifik 1950 yang mana mahkamah mendapati bahawa pampasan keewangan untuk kegagalan melaksanakan tidak akan menjadi relif yang memadai. Plaintif juga telah secara substantif melaksanakan tanggungjawabnya dibawah SPA tersebut melalui pembayaran deposit RM100,000, bayaran untuk jumlah penebusan yang kemudiannya dipulangkan oleh bank kerana penggantungan transaksi oleh defendan pertama dan pembayaran kepada akaun klien Tetuan Woon (lihat perenggan 43).]

Notes

For cases on sale and purchase agreement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7422–7427.

Cases referred to

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)
Ng Kian Wan v Choo Keng Hee & Anor [2014] 7 MLJ 81, HC (refd)
Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2010] 3 MLJ 425, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101, 103, 106, 114(g)
Specific Relief Act 1950 s 11(1)(c)

Tan Vincent (Tan Vincent & Azmi) for the plaintiff.
Raman Velu (Jo-Anne Joseph with him) (Raman Velu & Co) for the defendant.

See Mee Chun J:

PARTIES AND CLAIM

[1] This is plaintiff's claim essentially for specific performance of a sale and purchase agreement dated 19 January 2015 (SPA, C/16–31) entered into

between him and defendants. The SPA was for the sale of defendants' property, a semi detached house in Taman Bukit Dahlia, Pasir Gudang, Johor ('property') to plaintiff. The defendants are co proprietors of the property.

[2] The claim was resisted by defendants who although admitting to signing the SPA stated this was required as a collateral or condition for plaintiff to grant a friendly loan to defendant 1. In essence it was a money lending transaction. The defendants counterclaimed for a declaration that the SPA is null and void.

ISSUE

[3] As per Bundle F on the statement of issue to be tried the only issue for determination was whether the SPA is vaild, enforceable and binding on both the plaintiff and defendants.

WITNESSES

[4] Witnesses for the plaintiff were Pn Nurul Safwaty bt Salleh, lawyer with Messrs Woon Wee Yuen & Patners ('Messrs Woon') (PW1 and to be referred to as Nurul and witness statement marked as WSP1), Pn Aida bt Salihon, officer at Maybank Islamic Bhd ('PW2') and the plaintiff himself (PW3 and to be referred to as plaintiff and witness statement marked as WSP3). The sole witness for the defendants was defendant 1 himself (DW1 and to be referred to as defendant 1 and witness statement marked as WSD1).

THE PROPERTY

[5] It is not disputed the property was charged to Maybank Islamic Bhd ('bank') as security for a loan taken by defendant 1. This was also the evidence of PW2 who is the bank officer with knowledge of the loan facilty granted to defendant 1. This was in respect of an Islamic term financing which is a housing loan granted to defendant 1 for the sum of RM220,000. Refer to NOP/32.

[6] It is also not disputed plaintiff entered a caveat on the property on 25 January 2015 (C/33–35) and the defendants secured the assistance of one Shantini Tangavelu, defendant 2's distant relative, to enter a caveat on 22 May 2015 (C/36–38).

Whether the SPA is valid and binding

SPA signed

[7] In para 4 of the defence defendants do not deny it had signed the SPA but that they did so after receiving the assurance of Nurul the SPA would be

revoked once defendants had repaid the loan of RM100,000. Paragraph 4 of the statement of agreed facts (bundle F) states that defendants had executed the SPA and other relevant documents at Messrs Woon and the purchase price of RM303,000 was stated in the SPA. The plaintiff had appointed Messrs Woon to represent him in the sale and purchase of the property (para 5).

[8] Since the defendants have not denied signing the SPA and it is an agreed fact the defendants had signed the SPA which was futher confirmed by the evidence of defendant 1 himself in his Q&A 7 of WSD1 the court will not dwell on the evidence of Nurul in this respect. Suffice to say Nurul who was the conveyancing lawyer in charge of the plaintiff's purchase of the property had stated that both the plaintiff and defendants attended the office of Messrs Woon on 19 January 2015 to sign the SPA and she witnessed their signing.

Payment of RM100,000

[9] On the amount of RM100,00 the defendants too do not deny having received the amount as pleaded in its para 6 of defence and counterclaim. This was confirmed by defendant 1 in his Q&A 8 of WSD1 the money had been paid by way of two bankers cheques of RM50,000 each handed to him by Nurul. It is further provided in cl 2.1 of the SPA that the defendants as the vendors expressly acknowledged the receipt of the sum which is referred to as deposit. Reading cl 2.1 together with section 8 the RM100,000 was stated to be a deposit.

Caveat

[10] Having executed the SPA which included payment of the deposit the plaintiff entered a caveat on the property on 25 January 2015 and this would be in consonance with his right as a purchaser pursuant to cl 2.2 of the SPA which provides that 'the purchaser may upon the execution of this Agreement, at his own cost and expense lodge a caveat against the said Property'.

Redemption of bank loan

[11] The next step taken in the exercise of plaintiff's rights as purchaser of the property was towards the redemption of the bank loan. It was Nurul's evidence that the defendants also signed a letter of undertaking/consent dated 19 January 2015 (C/32) which states the defendants had allowed Messrs Woon to attend to the discharge of charge and any matters pending to the redemption of the property from the bank. The evidence showed the first attempt where Messrs Woon wrote to the bank for a redemption statement in January 2015 which was duly given on 30 January 2015. The redemption statement expired when plaintiff did not have sufficient funds to pay within time. In early June

2015 Messrs Woon received instruction to proceed with the redemption of the property whereupon it wrote to the bank on 9 June 2017 (C/41) copied to defendants. By letter dated 16 June 2015 the bank enclosed the redemption statement dated 15 June 2015 addressed to plaintiff copied to defendants (B/10 and 8–9). The plaintiff handed a banker's cheque (B/11) for the redemption sum of RM202,759.46 made payable to the bank to Messrs Woon on 22 June 2015 which was in turn forwarded to the bank by letter of the same date copied to defendants (C/42).

[12] According to PW2, the bank received a redemption request from Messrs Woon as the solicitor for plaintiff. From her experience when the borrower enters into a sale and purchase agreement to sell his property, the purchaser needs to redeem the property and discharge the charge before a transfer can be effected. This is a normal process. Along with the request for redemption would be forwarded the letter of undertaking/consent signed by the borrower. PW2 was referred to C/32 and stated this was the authorisation letter by the borrower to request the redemption. She has previously seen such letters and when asked if there was anything unusual about such letters stated 'this is the standard supporting document required by the Bank for the issuing of the redemption statement'. She confirmed the second request for redemption statement as in C/41. She stated the bank receives requests for fresh redemption statements very often. To a question whether there was anything suspicious about the request in C/41 she replied 'the bank has no doubt to it. This is normal for the law firm to request for the fresh redemption statement'. She confirmed the fresh redemption statement issued by the bank in A/8–9 and this was notified to the defendants by normal mail and the cover letter to Messrs Woon in A/10 (all in NOP/32–36). PW2 further confirmed the bank's receipt of the redemption sum of RM202,759.46 (NOP/37).

[13] It is also not disputed that the bank subsequently refunded the redemption amount to the plaintiff as there was an instruction from defendant 1 to hold the transaction and the bank was unable to proceed. This was conveyed to Messrs Woon by letter dated 1 January 2016 (C/54). PW2 confirmed this came about because of defendant 1's complaint dated 1 July 2015 where there was an allegation of money lending (C/44, NOP 45). In re-examination PW2 stated the bank had no knowledge about the money lending allegation and did not make any such finding nor investigation. The only reason for stopping the transaction was due to the borrower's request to hold (NOP 45–46).

[14] The plaintiff subsequently deposited the sum of RM202,759.46 into Messrs Woon's client account (Q&A 43 of WSP3).

Analysis and finding

[15] Thus the evidence as above shows there to be an SPA duly signed by both parties and was in fact confirmed by defendant 1. Receipt of RM100,000 was confirmed by defendant 1 although he said it was for a loan. The SPA provided the amount of RM100,000 was a deposit which interpretation is supported by a reading of cl 2.1 and section 8. The request for a fresh redemption statement was a normal procedure and there was nothing untoward about it, as confirmed by PW2. The supporting document was the letter of undertaking/consent signed by defendant 1 which in the words of PW2 was the authorisation by the borrower to request the redemption. Nurul had earlier stated defendants signed the letter of undertaking/consent at the same time as the SPA. The plaintiff paid the redemption sum of RM202,759.46 made payable to the bank to Messrs Woon on 22 June 2015 which was in turn forwarded to the bank by letter of the same date and copied to defendants (C/42). The bank confirmed receiving it.

[16] It was Nurul's evidence that defendants were not represented in the SPA where this was expressly stated in section 2 of the Schedule and the effect of defendants not appointing any lawyer was spelled out in cl 1.3 where the term 'vendor's solictors' shall then refer to purchaser's solicitors with the necessary changes to the provisions of the SPA (Q&A 27–28). In cross-examination Nurul stated it would have been a conflict of interest if she was to represent the defendants as she was the plaintiff's solicitor and she agreed this was not stated in her witness statement. In re-examination she clarified there was no conflict of interest as she could not act for both parties and only acted for the purchaser but asked for the redemption and settlement and title for discharge and the basis was the authorisation in C/32. The changes to cl 1.3 refered to the application for redemption statement and discharge of charge (NOP/23–24). There was therefore no conflict of interest where Nurul was only acting for plaintiff and she only applied for the redemption and requested for the title for discharge of the charge which is clearly allowed by the letter of undertaking/consent signed by the defendants in C/32.

[17] It was submitted the requirement in the SPA for defendants to apply for state consent for the transfer of the property was never done and that there was no follow up by plaintiff or Nurul showed it was intended to be a loan transaction. With regard to this it was never pleaded by the defendants. What was pleaded by the plaintiff in para 15 was that completion date was within six months from the date of consent of the state authority. In para 8 of the defence plaintiff was put to proof as to whether consent had been obtained. Although consent had never been applied by the defendants it was never pleaded that this showed it was a loan transaction and as such cannot be relied on to support the defendants' contention.

[18] The defendants having signed the SPA are therefore bound by the terms stipulated therein. Refer to *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425 for the principle that a person who signs a contractual document is bound by its terms even though he has not read it.

[19] Defendant 1 in his Q&A 4 said it was his understanding the SPA had to be signed as he required a short term loan of RM100,000 for six months where during this period he was to pay interest of RM5,000 for the loan. This was told to him by the agent one CK Lim (Lim). This was also the understanding told to him by Nurul at the office of Messrs Woon. Nurul in her Q&A 88–89 stated she had explained the salient terms of the SPA to the defendants and had never mentioned anything about the loan transaction or that the SPA would be cancelled once the loan had been settled. According to Nurul the entire understanding between the parties had been duly incorporated into the SPA and there can be no confirmation outside its terms. Clause 22 of the SPA was relied on.

[20] In the case of defendant 1 he is a highly educated person with a masters in project managment in oil and gas and had worked as a regional commercial manager for Boilermaster Pte Ltd. He agreed to then holding a position of great responsibilty (NOP/78). He confirmed he could understand the SPA and knew that when at Messrs Woon he was given the SPA to sign and that it was normal for law firms to prepare SPAs for property transcations. He agreed it was unusual and improbable for a law firm to prepare SPA under the guise of a loan transaction. He also agreed no one at Messrs Woon forced or coerced him or defendant 2 into signing the SPA and if he had not agreed with the SPA to sell the property he and defendant 2 could have walked away but they didn't (NOP/87–88).

[21] Going by the evidence above it is more probable defendant 1 knew what he was signing, which was an agreement for the sale and purcahse of land, and being from the commercial world, would know that one is bound by what is signed. It was not probable that Nurul would have told defendants otherwise, that this was a loan transaction and the agreement would be cancelled upon the repayment of the loan. This is more so when going by defendant 1's evidence he has no proof of any notice of demand or legal action taken against Messrs Woon (NOP/89–90) and he has not taken any action against Nurul (NOP/96).

Loan

[22] The further evidence of defendant 1 was that the loan of RM100,000 was from Lim and it was he who said interest of RM5,000 would have to be paid every month for six months and also that the SPA would be cancelled

upon repayment of the loan. The evidence of defendant 1 as to how he met Lim can be found in his Q&A 5. In essence defendant 1 said he met Lim at a coffee shop where he was seated alone. Lim approached him with a business card which he has since misplaced. Lim told him for mortgage loans the interest is lower and the loan immediate. He was not interested and returned the business card. Lim took his business card and called him that same evening and told him if he was interested in the mortgage loan he was to hand over his house documents and latest quit rent and assessment receipts. He met Lim at the same coffee shop at 10.30am the following day. Lim looked at the documents, called someone and said the maximum loan he could offer was RM250,000. He however required only RM100,000 to pay his company's suppliers. In Q&A 6 he stated he then attended at Messrs Woon and met Nurul who assured him several times the SPA was to be signed to secure the loan and would become null and void once the loan was paid in full.

[23] In Q&A 23 he referred to a cheque for RM7,500 (D/70) issued by his company Flow SynergyTechnics Sdn Bhd. He had been instructed by Nurul to issue the cheque to L&P Hwa Trading ('L&P'). The sum of RM5,000 was the first interest payment for the loan whereas the balance RM2,500 was paid to Messrs Woon as legal fees.

[24] In cross-examination he agreed the loan of RM100,00 was given by Lim and he only dealt with Lim at all times. He did not know the plaintiff and never met him before and agreed the plaintiff had nothing to do with the loan. He did not know Lim's full name and agreed if he took a loan it would be important to at least get the full name and identity card number. He disagreed Lim was a fictional character created to dispute the plaintiff's claim. He confirmed the plaintiff was not Lim (NOP/91–94).

[25] It was Lim and Nurul who told him to pay interest of RM5,000 for six months. He has paid four months interest and when asked for the documents to show proof of payment replied 'we have produced the bank in slips and everything'. On the cheque of RM7,500 issued to L&P having nothing to do with the plaintiff he said he was not sure (NOP/96–97). On the balance RM2,500 paid to Messrs Woon as legal fees he stated he had not produce any receipt (NOP/125).

[26] With regard to his meeting up with Lim at the coffeeshop he stated he had never met Lim prior to this and did not know who he was (NOP/99). He was then asked as to whether he expected the court to believe that out of the blue Lim appeared and offered him a loan to which his answer was 'Yes I do'; and that Lim had the insight to know he needed a loan for his business and his answer was 'No' (NOP/100). He agreed he was not interested in taking up the loan when he was first approached but disagreed that if that was the case he

would not have given Lim his business card and mobile number (NOP/101). As to Lim calling him the very same day he disagreed to the suggestion that this was unlikely when he had just told Lim he was not interested (NOP/102). To a question that 'are you saying you had a complete change of mind in the evening of the same day just through a phone conversation with CK Lim' he said 'Yes I do' and he disagreed he was making up stories on the phone conversation (NOP/103).

[27] The reason for the loan was to pay his company Flow Synergy Technics Sdn Bhd suppliers. He disagreed it should be the company applying for the loan and not him. He agreed he had not produced any document to prove the company was indebted to suppliers or that any notice of demand had been served (NOP/103–104). He agreed he had savings of more than RM100,000 (NOP/106).

[28] In re-examination he stated the interest for four months had been paid first to L&P and then to some company S&P Fishery. He also stated a lot of money was needed in the oil and gas industry and when in urgent need of money he would try and get funds from friends and where he could not he mortgaged his house (NOP/133–134).

[29] An analysis of the above evidence would show it is not probable that Lim appeared from nowhere to approach defendant 1 with the offer of a loan or that Lim would even know that defendant 1 was in need of a loan. If as defendant 1 said he was not interested there would be no reason for him to give Lim who is a complete stranger his business card and mobile phone number. It is also not probable that all it took was one phone call from Lim on the very same evening of the chance meeting to bring about a complete change of mind from no interest in a loan to one of interest. It is also not probable that the defendant would not know Lim's full name other than that of CK Lim when he was going to take up a RM100,000 loan and mortgage his property and to accept the assurances of a total stranger the SPA would be cancelled upon repayment of the loan.

[30] If as defendant 1 said the loan was to pay the company's suppliers surely it ought to be done by the company and not him personally. Further there was no proof of the company's indebtness to its suppliers. If indeed the company needed the money to pay off its suppliers urgently defendant 1 by his own evidence stated he had savings of more than RM100,000 and this could have been utilised rather than mortgaging the property which is the defendants' place of residence. The first month RM5,000 interest was to L&P and not to Lim and the defendant was not sure if that company had anything to do with the plaintiff. There was no receipt to support his evidence the balance of RM2,500 was paid to Messrs Woon as legal fees more so when that firm was

not representing the defendants in the SPA. The other months of payment of interest was to L&P and a company by the name of S&P Fishery a name which first surfaced during re-examination. There were also no documents to show such payment.

[31] The court can only conclude there was no such lim and there was no friendly loan given under the terms as stated by defendant 1 of RM5,000 interest for six months and the SPA to be cancelled upon full payment. Refer to *Ng Kian Wan v Choo Keng Hee & Anor* [2014] 7 MLJ 81 at p 87 on the evidence needed to prove a money lending transaction and the requirement to call the key person as a witness. In *Ng Kian Wah* it was stated as follows:

> [3] The question is whether the RM400,000 was a loan by an unlicensed moneylender as alleged by the defendants. This is the main plank of the defendants' case. Their defence must stand or fall within the four walls of this allegation. In this regard the first point to note is that Robert Lee who allegedly borrowed the money from the plaintiff was not called as a witness. There is therefore no way of knowing if there is any truth in the first difendant's alleation that the RM400,000 was a loan to Robert Lee. It remains a bare allegation. Not a single document was produced by the defendants to show that the money was meant as a loan, as opposed to the plaintiff who had produced all the necessary documents to prove that the RM400,000 was meant as down payment and part payment fot he purchase of the four parcels of land ...

[32] Here it was the basis of the defendants counterclaim there was a loan from Lim such that the evidence of Lim would be able to prove it. Refer to ss 101, 103 and 106 of the Evidence Act 1950 and *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627. In *Juahir bin Sadikon* it was stated at p 635:

> He who alleges must prove such allegation and the onus is on the applellant to do so. See s 103 of the Act. Thus, it is incumbent upon the applellant to produce Tan Sri Basir as his witness to ptove the alleagation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to raised such an allegation and, secondly, has denied even making one ...

[33] If the court were to accept the evidence there was such a person then it was Lim who gave the loan and not the plaintiff. It was Lim who instructed payment of the RM5,000 interest for six months. By defendant 1's evidence he had not met the plaintiff, the discussion on the loan was with Lim and the plaintiff was not Lim. As the plaintiff was not a party to the loan the contention that the SPA is a collateral for the loan cannot stand.

[34] It is also noted that the bank when holding the transaction and refunding the redemption sum to the plaintiff did so on defendant 1's

instruction and not on any finding of money lending transaction.

No intention to sell

[35] Defendant 1 had also stated he could not have intended to sell the property when the purchase price was RM303,000 and the market value at RM550,000. Defendant 1 had agreed there was no valuation report produced in court and that if the property was worth that much he would not have pledged it as a security for a RM100,000 loan (NOP/120–121). Defendant 1's own evidence thus puts paid to his contention of not intending to sell at a lower price when there was no proof of the market value.

[36] In his police report made on 18 May 2015 (C/45) he stated 'saya ingin menjelaskan hutang tersebut kerana saya ingin menjual rumah tersebut'. When it was put to him this meant his report was tainted with falsehood he disagreed and maintained his position he had no intention of selling the property (NOP/118). In re-examination he stated the matter was being dragged too long when he wanted to sort out the amount and 'I saying that I want to sell off the house, give me quick answer and I want to settle the loan. That is my intention in fact, not to sell the house because I just wanted to push them to give me an answer' (NOP/135). Although his intention may have to push for a quick answer on the amount outstanding this does not detract from the statement in the police report, where one is expected to be truthful, that he wanted to sell the property.

Efforts to settle the loan

[37] It was also the defendants case that there had been efforts to find out the loan amount outstanding but to no avail. He had called Nurul several times who told him to contact Lim who in turn asked him to refer to Nurul. There was however no proof of this and there was no document to show Messrs Woon had given all sorts of excuse to prevent the defendants from repaying the loan or that there was any notice of demand to Messrs Woon to this effect (NOP/89).

Conduct of Plaintiff

[38] Much was also made of the plaintiff's evidence that the purchase was done through a middle man, one Tan, from whom he knew of the defendants' property being put up for sale and that he had not physically viewed the interior of the house and was satisfied after viewing photos from Tan where such photos were not produced in court, that he liked the property because there was a playground opposite and that he could not remember how many bedrooms and bathrooms there were nor could he recall the total land area and did not know the built up area. It was further contended that Tan ought to be

called as a witness and s 114(g) of the Evidence Act ought to be invoked. The plaintiff had also contradicted himself when he said he instructed Nurul in the middle of January 2015 to state the purchase price and his earlier evidence that he appointed Messrs Woon to prepare the SPA somewhere end of January 2015 after the defendants agreed to sell the property.

[39] With regard to his having appointed Messrs Woon at end January 2015 he stated in re-examination with reference to the SPA that the appointment was on 19 January 2015. As the why he said end January he said he cannot recall the exact date as the case happened sometime ago (NOP/63–64). As to not being able to remember the details of the house he gave the same answer (NOP/64).

[40] The court accepts the explanation of plaintiff on when the appointment of Messrs Woon was made. As to not being able to remember the details of the property this happened some three years ago and the particulars of the property are set out in section 4 of the Schedule. The failure to call Tan is not fatal to the plaintiff's case where he is essentially seeking to enforce the SPA signed. What the plaintiff needs to prove is the signing of the SPA. The same goes for his reason to purchase based on the playground opposite the property which according to defendant 1 was 800–900 meters away and not on the interior of the property, and this does not negate the fact that the SPA was duly signed.

Others

[41] The court will add that there is no requirement for the plaintiff to have met the defendants before signing the SPA even if there was such a request from the defendants.

[42] With regard to the contention that defendant 2 ought to have called as a witness there really was no necessity when it was not disputed the defendants had signed the SPA. The thrust of the defence being that of a loan could only be adduced by defendant 1 as he was the one who met Lim and took the loan from him.

Conclusion

[43] From the totality of the evidence this was an SPA for the sale and purchase of the property and not a loan agreement. This is an apt case for specific performance pursuant to s 11(1)(c) coupled with illustration (a) of the Specific Relief Act 1950 where the court finds that pecuniary compensation for non-performance would not afford adequate relief. The plaintiff too has substantially performed his obligations under the SPA by payment of the deposit, payment of the redemption sum which was susequently returned by

A the bank due to a hold transaction from defendant 1 and the payment into Messrs Woon's client account.

[44] The plaintiff's claim is allowed and the defendants' counterclaim is dismissed. Costs to the plaintiff.

B

Plaintiff's claim allowed; and defendants' counterclaim dismissed with costs.

Reported by Izzat Fauzan

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